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In the Supreme Court of the United States

OCTOBER TERM, 1971

VIRGINIA STAGE LINES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 441 F. 2d 499 (C.A. 4). The decision and order of the National Labor Relations Board (Pet. App. 26a-28a) are reported at 182 NLRB No. 107. The decision of the trial examiner is printed in Pet. App. 13a-25a.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a) was entered on May 10, 1971. The petition for a writ of certiorari was filed on August 3, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner violated Section 8(a)(1) of the National Labor Relations Act by discharging two drivers who refused to cross a picket line to perform work that would otherwise have been performed by employees striking another, commonly owned company.[1]

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at page 3 of the petition.

STATEMENT

A. The Board's Findings of Fact

Petitioner, Virginia Stage Lines, Inc. (Virginia), and Safeway Trails, Inc. (Safeway), are wholly owned subsidiaries of Continental Trailways, Inc. Both Virginia and Safeway operate regularly scheduled and charter buses out of the Trailways Termi-

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[1] A similar issue is presented in *Union Carbide Corp.* v. *National Labor Relations Board*, No. 70-200.

nal in Washington, D. C. Virginia's regularly scheduled routes are between Washington and points south; Safeway's run between Washington and points north. Both companies have Interstate Commerce Commission authority to run charter buses to and from Washington in either direction, but both generally concentrate their charter business in the areas covered by their scheduled operations. (Pet. App. 14a-15a; A. 11-12.)[2]

The terminal's sales director, who directs charters for all Continental Trailways companies serving the area, generally assigns charters north of Washington to Safeway if that company has equipment available. Charters south of Washington are assigned to Virginia until its quota is filled. When Safeway is unable to provide a bus for a northbound charter, the director calls on Virginia to take the run. Conversely, when Virginia cannot take a southbound charter, Safeway ordinarily is offered the job. Only when both companies lack equipment does the director offer the charter to a non-affiliated bus line. (Pet. App. 14a-15a; A. 104-106.)

Safeway drivers were represented by the United Transportation Union, AFL-CIO (the Union). The eastern division of petitioner Virginia was not organized (Pet. App. 15a).

In April 1969, Safeway's drivers went on strike against Safeway in a dispute over new contract terms. During the strike, which lasted five months,

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[2] "A." refers to the Joint Appendix to the briefs in the court of appeals.

the strikers picketed the Trailways Terminal in Washington and the garage used by both Safeway and Virginia, so that the Virginia drivers, who were not represented by a union, had to cross the picket lines to come to work. (Pet. App. 15a; A. 9-10.) The strike caused Safeway to cancel its scheduled runs and to curtail its charter operations from 30 buses a day to 7 or 12 (Pet. App. 15a; A. 106-108). While Virginia did not assume any of Safeway's scheduled runs, its northbound charter business increased by up to 7 buses per day as a direct result of the strike. Thus, whereas between May 1 and June 20, 1968, Virginia had operated only 21 charter trips into territory primarily serviced by Safeway, during the same period in 1969 the number of such trips increased to 130. (Pet. App. 15a; A. 54-56, 103-104, 113-117.)

Charles Tallent and Richard Loughhead were employees of petitioner Virginia, assigned to its "extra board"—they rotated with other "extra board" drivers to drive charters and special sections on scheduled runs and to substitute for unavailable regular drivers (Pet. App. 16a, n. 2; A. 19, 34, 85-86). Tallent and Loughhead had been supporters of the Union's efforts to organize the eastern division of Virginia.[3] During the strike both willingly drove scheduled runs and southbound charters even though this required

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[3] A year before the strike they had made their apartment available for meetings to discuss affiliation with the Union, and, during the strike, they solicited their fellow employees for a representation election (Pet. 18a, n. 4; A. 21-22, 30-31, 36-37).

their crossing the Safeway drivers' picket lines. In the beginning of the strike they took occasional charter trips north, but, as the strike wore on, both men, reciting threats by Safeway strikers, refused to accept northbound charters. At the time of his refusal to take a northbound charter, Tallent told the company he regarded the trip as "Safeway work." Although both drivers said they wished to continue driving to the south, they were discharged. (Pet. App. 16a-18a; A. 23-24, 41-43, 62-63, 69, 80, 93, 97-98.)

Several days after Loughhead's discharge, he notified his supervisor that, if other drivers continued to drive north, he would also go. Virginia, however, refused to reinstate him. Tallent did not apply for reinstatement. (Pet. App. 17a; A. 25.) No employees were hired as permanent replacements for Loughhead or Tallent (Pet. App. 18a-19a; A. 69, 87, 81, 93-94).

B. The Decisions Below

The Board found that Loughhead and Tallent refused to drive northbound charters as a "direct result of picketing activities by the Union in support of the strike against Safeway," that this was concerted activity protected by Section 7 of the Act, and that Virginia, in discharging them for this activity, "acted in reprisal for the employees' concerted action rather than to carry on its business," and thus violated Section 8(a)(1) of the Act (Pet. App. 20a-22a). The Board ordered Virginia, *inter alia*, to offer Loughhead and Tallent full reinstatement and to

make them whole for lost earnings (Pet. App. 22a-25a, 27a-28a). The court of appeals (one judge dissenting) sustained the Board's findings and conclusions, and enforced its order.

ARGUMENT

Petitioner's basic contention is that, since employees Loughhead and Tallent were willing to cross the picket lines to perform other work, their refusal to cross the lines to perform the northern charter work was an unprotected partial strike (Pet. 18-19). It is true that certain kinds of employee conduct, falling short of an unqualified refusal to work, have been denied the protection of Section 7 of the Act because they are calculated randomly to disrupt the employers' production and planning, and thus to inflict undue economic hardship upon him. See, *e.g.*, *Auto. Workers* v. *Wisconsin Board*, 336 U.S. 245, 249-250, 264, n. 17. But a selective refusal to cross a picket line has none of these consequences. It is not calculated to harm the employer, except to the extent necessary to help other striking employees, and it is predictable, allowing the employer to take any necessary corrective action, including—as the court below observed—replacement of the employees (Pet. App. 7a). In short, the injury to the employer is no greater than—indeed it is less than—the injury caused by an unqualified refusal to cross a picket line at his place of business. Thus, as the court below properly concluded, this case falls within the rationale of decisions holding that Section 7 protects an em-

ployee who refuses altogether to cross a picket line at his employer's place of business.[4]

Indeed, an employee's refusal to cross a picket line at a place of business of an employer wholly unrelated to his own has been held to be protected by Section 7, even though such activity usually entails only a partial refusal to perform work. *E.g., National Labor Relations Board* v. *Swain and Morris Construction Co.*, 431 F. 2d 861 (C.A. 9); *National Labor Relations Board* v. *Alamo Express, Inc.*, 430 F. 2d 1032, 1036 (C.A. 5); *Teamsters, Local 657* v. *National Labor Relations Board (Chemical Express, Inc.)*, 429 F. 2d 204 (C.A. D.C.).

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[4] As the court below added (Pet. App. 5a, n. 4): "The kinship of Virginia Stage and Safeway distinguishes this case from *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71 (1953), and *NLRB* v. *L. G. Everist, Inc.*, 334 F. 2d 312 (8th Cir. 1964), which did not involve a common employer."

In *National Labor Relations Board* v. *Illinois Bell Telephone Co.*, 189 F. 2d 125 (Pet. 20), the Seventh Circuit held that employee refusals to cross a picket line were unprotected. However, the court relied, in part, on the fact that the employees who refused could have interfered with contract negotiations by their union representatives then in progress. The employees here were not represented by a union, so no similar problem exists. Moreover, insofar as *Illinois Bell* may be deemed to hold that such refusals constitute individual, rather than concerted, activity, the Seventh Circuit has subsequently rejected that view. See *National Labor Relations Board* v. *John S. Swift Co.*, 277 F.2d 641, 646 (C.A. 7).

Nor is review warranted of petitioner's further contention (Pet. 14-16) that the Board's order unduly impinges upon the employer's freedom to run his business.[5] Petitioner did not specifically raise this contention before the Board. See *Marshall Field & Company* v. *National Labor Relations Board*, 318 U.S. 253, 255. Moreover, the Board's order must be read in light of the principles applied in its decision. Under those principles, if the employee refuses to perform work which the employer believes is essential to the conduct of his operation, he is free to replace that employee with another who will do such work.

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[5] In addition to a reinstatement and backpay provision (*supra*, pp. 5-6), the Board's order provides that Virginia shall cease and desist from discharging or otherwise discriminating against any employee "because he * * * has assisted a labor organization by refusing during the course of a strike to perform work which the strikers contend would normally be performed by them" (Pet. App. 23a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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